

Fernandez v Landau
2021 NY Slip Op 32925(U)
July 7, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035033/2018
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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FRANK FERNANDEZ and SHERRY FERNANDEZ,

Plaintiffs,

**DECISION AND ORDER
(Motions # 4, 5, and 6)**

-against-

Index No.: 035033/2018

MOSHE LANDAU, JOEL SALAMON and SALAMON'S
HOME IMPROVEMENTS, INC.

Defendants.

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JOEL SALAMON and SALAMON'S HOME IMPROVEMENTS,
INC.

Third-Party Plaintiffs,

-against-

D'AGOSTINO LANDSCAPE & IRRIGATION and
D'AGOSTINO LANDSCAPE, INC.,

Third-Party Defendants.

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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 13, were considered in connection with (i) Defendant-Third-Party Plaintiff Joel Salamon and Salamon's Home Improvement Inc.'s (hereinafter collectively "Salamon") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 2221, granting leave to reargue/renew those portions of the Court's decision dated February 24, 2021, which (1) granted Defendant Moshe Landau permission to amend its answer to assert cross-claims for contribution and common law indemnification, and (2) the denial of its motion to dismiss the counterclaim asserted by third-party defendant "D'Agostino Landscape (**Motion #4**); (ii) Defendant Moshe Landau's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 2221, granting leave to reargue/renew this Court's Decision dated February 24, 2021, which denied summary judgment and dismissal of Plaintiff's Complaint against him (**Motion #5**); and (iii) Defendant Salamon's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment

dismissing all cross-claims and counterclaims for common law contribution/indemnification against it (**Motion #6**):

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION(#4)/AFFIRMATION AND MEMORANDUM OF LAW IN SUPPORT/EXHIBIT A	1-2
NOTICE OF MOTION(#5)/AFFIRMATION IN SUPPORT/EXHIBITS 1-7	3-4
DEFENDANT LANDAU’S AFFIRMATION IN OPPOSITION (#4)/ EXHIBIT A	5
PLAINTIFF’S AFFIRMATION IN OPPOSITION TO MOTION (#5)/ EXHIBITS 1-2	6
AFFIRMATION IN REPLY (#5)	7
CORRESPONDENCE FROM DEFENDANT D’AGOSTINO DATED APRIL 26, 2021	8
NOTICE OF MOTION(#6)/STATEMENT OF MATERIAL FACTS/AFFIRMATION IN SUPPORT	9-11
LANDAU’S AFFIRMATION IN PARTIAL OPPOSITION (#6)	12
D’AGOSTINO’S AFFIRMATION IN OPPOSITION(#6)/EXHIBIT A	13

Upon the foregoing papers, the Court now rules as follows:

By Decision and Order dated February 24, 2021, and entered on February 25, 2021, this Court decided summary judgment motions brought by several parties. As is relevant to the motions presently before the Court, the Court denied Defendant Landau’s summary judgment motion on the ground that he, as the owner of the subject property, owed a duty to keep the premises in a safe condition, and based upon such duty, there were triable issues of fact as to whether he satisfied this duty with respect to his own actions, as well as the actions of the independent contractors D’Agostino and Salamon for whom he could be vicariously liable. This Court also granted Defendant Landau’s motion to amend his answer to assert cross-claims against Salamon and D’Agostino for common law indemnification and

contribution. Lastly, the Court denied Defendant Salamon's summary judgment motion to dismiss all counter-claims and cross-claims asserted against them.

Defendant Salamon moves to renew and reargue those portions of this Court's decision which granted Defendant Moshe Landau permission to amend its answer to assert cross-claims for contribution and common law indemnification, and the denial of its motion to dismiss the counterclaim asserted by third-party defendant D'Agostino Landscape. Defendant Landau also moves to reargue/renew this Court's decision which denied his summary judgment motion to dismiss Plaintiff's complaint against him. Lastly, Defendant Salamon moves for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment dismissing all cross-claims and counterclaims for common law contribution/indemnification against it

Turning first to Defendant Landau's motion, the Court notes that his motion, although it states that it seeks to renew and reargue this Court's Order, is in fact one for reargument only. "Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the fact or law or for some reasons mistakenly arrived at its earlier decision." *Ito v. 324 East 9th Street Corp.*, 49 A.D.3d 816, 857 N.Y.S.2d 578, 579 (2d Dept. 2008); *E.W. Howell Co., Inc. V. S.A.F La Sala Corp.*, 36 A.D.3d 653, 828 N.Y.S.2d 212 (2d Dept. 2007); *Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573, 574 (2d Dept. 2009). "It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *McGill v. Goldman*, 261 A.D.2d 593, 261 N.Y.S.2d 75, 76 (2d Dept. 1999). Thus, reargument "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Rubinstein v. Goldman*, 225 A.D.2d 328, 638 N.Y.S.2d 469 (1st Dept. 1996).

In the instant matter, this Court did not misapprehend either the facts or the relevant case law. For the most part, Defendant Landau merely reasserts the arguments

which he set forth in the underlying papers and the Court continues to remain unpersuaded for the same reasons set forth in its decision. The Court correctly found that Landau owed a duty of care to Plaintiff to keep his property in safe repair. Defendant Landau was not an out of possession landlord, and in fact, was at subject property on a daily basis. Given that he owed a duty to keep the property in safe repair, was present on a regular basis, would be responsible for his own actions, and could also be vicariously responsible for the actions of the contractors, the Court found triable issues of fact and denied his summary judgment motion. Accordingly, Defendant Landau's motion to renew/reargue this Court's decision is denied in its entirety.

Turning next to Defendant Salamon's motion, "[A] motion for leave to renew: (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR Sec. 2221(e). Defendant Salamon's motion is indeed one for renewal since Defendants Salomon and D'Agostino settled the action with Plaintiff after the motions were deemed submitted but before they were decided. On April 23, 2021, Defendant Salamon filed a Stipulation of Discontinuance of cross-claims against defendant/third-party Plaintiff Salomon, and argues that the motion is therefore moot. As such, that portion of Defendant Salamon's motion to renew the Court's decision to permit Defendant Landau to amend his Answer is hereby denied as moot.

However, the Court still must address the portion of Salamon's renewal motion denying the application to dismiss all cross-claims and counter-claims asserted against it, including those of D'Agostino. Defendant Salomon's summary judgment motion (Motion #6) essentially asks for the same relief and so that motion will be addressed here as well. Salamon argues that because it settled the action with Plaintiff, both Landau and D'Agostino's counter-claims and cross-claims are barred by General Obligations Law ("GOL") § 15-108. Although

Defendant D'Agostino did not file a formal cross-motion, it argues that for reasons of judicial economy, the Court should grant it the same relief, as the General Release given by Plaintiff to it, also bars claims of contribution and common-law indemnification asserted against it by co-defendants.

GOL § 15-108(b), entitled "Release of tortfeasor," states that "[A] release given in good faith by the injured person to one tortfeasor as provided in subdivision(a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules. Likewise, GOL § 15-108(c), entitled "Waiver of Contribution," states that "[A] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." General Obligations Law § 15-108 applies to claims for contribution but not to those seeking to vindicate a party's common law right of indemnification. *Glaser v. M. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 646, 529 N.Y.S.2d 59 (1988).

Thus, where a party who has settled seeks to avoid the bar to reimbursement posed by General Obligations Law § 15-108(c), that party must show that "it may not be held responsible in any degree for the plaintiff's damages. *Id.* at 647; *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 24-25, 494 N.Y.S.2d 851 (1985). In the instant matter, Defendant D'Agostino's cross-claims/counterclaims must be dismissed as against Salamon pursuant to GOL § 15-108. D'Agostino has obtained its own release from Plaintiff and cannot show that it may not be held responsible in any degree for Plaintiff's damages. Thus, this Court grants Defendant Salamon's motion to renew and upon renewal, grants Salamon summary judgment and dismisses all cross-claims and counterclaims against it.

With respect to Defendant D'Agostino, Defendant Landau argues that the Court should not dismiss his common law indemnification claim against it because (i) Defendant did not file a cross-motion; and (ii) because there is a viable common law indemnification claim against D'Agostino. As an initial matter, the Court notes that the Supreme Court has the authority pursuant to CPLR § 3212(b) to search the record and grant summary judgment to

a nonmoving party with respect to an issue that was the subject of the motion before the Court. *Goldstein v. County of Suffolk*, 300 A.D.2d 441, 442, 751 N.Y.S.2d 549 (2d Dept. 2002). Given that D'Agostino has also settled with Plaintiff, and is arguing that Landau's claims against it should similarly be dismissed against it pursuant to GOL §15-108(c), the Court will address whether D'Agostino is also entitled to summary judgment and dismissal of Landau's cross-claims.

The issue to be determined is whether or not there is a viable common law indemnification claim by Landau against D'Agostino. "Generally, apportionment among tortfeasors, rather than a shifting of the entire loss through indemnification, is the proper rule when 'two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[] to the injured person.'" *Guzman v. Haven Plaza Housing Development Fund Co., Inc.*, 69 N.Y.2d 558, 567, 516 N.Y.S.2d 451 (1987). "Whether apportionment or common-law indemnity should be applied in a given case, however, requires a careful analysis of the theory of recovery against each tort-feasor." *Id.* The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed to the indemnitee by the indemnitor. *Glaser*, 71 N.Y.2d at 646.

"Common law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine.'" *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 367, 807 N.Y.S.2d 353 (1st Dept. 2006). Common law indemnification is applied to "those who are only vicariously liable, as the employer of a negligent employee, the owner of a motor vehicle operated by a negligent driver, or***the owner of a building who contracts with an independent contractor *exclusively* responsible for maintenance of the building or parts of it. [emphasis added]" *Guzman*, 69 N.Y.2d at 567.

In the instant matter, as in the *Guzman* case, D'Agostino did not totally divest Landau of control over, or responsibility for, repairs and maintenance of the property. See

Guzman, at 455. Landau remained responsible, under the law, for the safe condition of the building. Additionally, there was no special relationship running from D'Agostino to Landau which would confer implied common law indemnification, as D'Agostino actually contracted with Salamon to perform work at the property. Accordingly, the Court finds that contribution is appropriate and that there is not a viable common law indemnification claim between Landau and D'Agostino. However, since D'Agostino has settled with Plaintiff, any claims of contribution are barred by GOL § 15-108. Accordingly, D'Agostino is also entitled to summary judgment and dismissal of any cross-claims or counter-claims against it.

Accordingly, it is hereby

ORDERED the Notice of Motion (#4) filed by Defendants Joel Salamon and Salamon's Home Improvements, Inc. for renewal/reargument of the Court's Decision dated February 24, 2021 is GRANTED to the extent set forth herein and all counter-claims and cross-claims asserted against it are dismissed; and it is further

ORDERED that the Notice of Motion (#5) filed by Defendant Landau for renewal/reargument of this Court's decision dated February 24, 2021 is DENIED in its entirety; and it is further

ORDERED that the Notice of Motion (#6) filed by Defendants Joel Salamon and Salamon's Home Improvements for summary judgment and dismissal of any and all counterclaims and cross-claims against it is GRANTED; and it is further

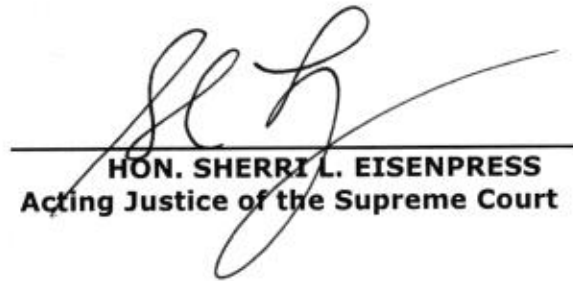
ORDERED that any and all cross-claims and counterclaims against defendant D'Agostino Landscape & Irrigation and D'Agostino Landscape, Inc. are dismissed and defendants are granted summary judgment in their favor, and it is further

ORDERED that the Plaintiffs and Defendant Landau are to appear for a settlement conference on **SEPTEMBER 17, 2021 at 10 a.m.** via Microsoft Teams. Counsel participating in the settlement conference must have knowledge of the matter, as well as authority, and must arrange to be able to speak to their clients with respect to settlement offers, if necessary.

The foregoing constitutes the Decision and Order of this Court on Motions #4-

6.

Dated: New City, New York
July 7, 2021



HON. SHERRIL L. EISENPRESS
Acting Justice of the Supreme Court

TO: (All parties via NYSCEF)